United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

B P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-2545

FLOZELL JONES, Administrator of the Estate of Dennis Jones, Decedent,	:
Plaintiff/Appellant	:
vs.	:
KEITH MARSHALL,	:
Defendant/Appellee	:

BRIEF OF APPELLANT

Submitted by:

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STATEMENT OF ISSUES PRESENTED

1. Whether in civil actions brought pursuant to 42 U.S.C. §1983, federal courts are bound to apply the analogous rules of tort law of the state within which they sit?
2. Whether the common law rule permitting police officers to use deadly force when effecting the arrest of a fleeing felony suspect is consistent with the laws and Constitution of the United States?

STATEMENT OF THE CASE

This action for damages arose from the wrongful death of Dennis Jones. It is brought by his father Flozell Jones, as Administrator of the estate. Federal jurisdiction is based on Title 42, U.S.C. §1983 and Title 18 U.S.C. §1343.

The action originally named the defendant Keith Marshall, a police officer, the Town of West Hartford, West Hartford's Police Chief William Rush, and West Hartford's Town Manager Richard Custer. The actions against the latter parties were dismissed by Judge Blumenfeld on June 29, 1971, cf. Moor v. County of Alameida, 411 U.S. 693 (1973); City of Kenosha v. Bruno, 412 U.S. 507 (1973).

Proceeding on a stipulation of facts, the parties made cross motions for summary judgment. The District Court entered judgment for the defendants. The District Court's opinion is reported at 383 F.Supp. 358 (D. Conn. 1974). This Court has jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF FACTS

On August 29, 1969, at approximately 12 o'clock noon, Officer Keith Marshall of the West Hartford Police Department, while on patrol in a police cruiser and in the course of the performance of his duties, observed a Cadillac automobile occupied by three black males, later identified as Russell Seals, Jr., Raymond Arter and the decedent, Dennis Jones, all of Hartford Connecticut. The automobile was proceeding in a westerly direction on Simsbury Road in West Hartford, in the vicinity of the Hartford Golf Club.

Officer Marshall through radio contact with the West Hartford Police headquarters received information that the Cadillac was a stolen vehicle and he therefore began to follow it.

He followed the car through the Hartford Golf Club onto Norwood Road until it reached a stop sign located at Norwood Road and Albany Avenue. At the stop sign the Cadillac stopped for traffic and then turned left onto Albany Avenue, heading for Hartford. Officer Marshall continued to follow the car.

After it crossed the Hartford town line, the car turned left at Mark Twain Drive, and headed in a northerly direction. The car then turned right onto Dillon Road. Dillon Road is a semicircular road and returns without intersecting any other street to Mark Twain Drive. The automobile circled back onto Mark Twain Drive again turning right and it was therefore once again heading north on Mark Twain Drive.

While following the car, Officer Marshall did not activate his siren or warning signal or make any attempt to cause the Cadillac to come to a stop. Prior to the time the Cadillac re-entered Mark Twain Drive, it had not been driven at speeds which exceeded 35 to 40 miles per hour nor had any traffic regulations been violated. No high speed chase had occurred. Prior to the time that the automobile re-entered Mark Twain Drive, Officer Marshall had learned by car radio that the Hartford Police Department had dispatched assistance which was on its way.

When the Cadillac re-entered Mark Twain Drive from Dillon Road it accelerated to a speed of approximately 80 miles an hour. It reached the end of Mark Twain Drive and continued straight ahead entering onto the Mark Twain Extension at the end of which it skidded to a halt. Officer Marshall continued to follow the car and the two automobiles were engaged in a high speed chase.

Upon arriving at the point at which the Cadillac had stopped, Officer Marshall skidded to a helt and alighted from his cruiser with his weapon drawn. The braking of both cars had created a large cloud of dust.

The occupants of the Cadillac were not immediately visible. Officer Marshall therefore climbed to the top of an adjacent embankment to get a better view. From that point, he observed two males running across an open field. He called at them to halt. They halted momentarily, turned to face him and then they turned again and began to run away from where Officer Marshall was standing. They were running across a field toward a nearby wooded area. Without firing a warning shot or attempting any further means of apprehension, Officer Marshall fired his weapon at one of the two males and the single shot he fired killed the decedent

Dennis Jones. Dennis Jones was 16 years old.

Officer Marshall had aimed at the decedent's leg. The bullet, however, had struck the decedent in the left buttock and penetrated through the left ilium and lacerated the left common iliac artery, peritoneum, massentery and jejunum, ultimately causing death.

Officer Marshall had been 125 feet from Dennis Jones when he fired his weapon. The distance between them can be characterized as a field covered with bushes and underbrush.

Neither the decedent nor any of the other individuals in the Cadillac had been armed or had specifically threatened physical injury to Officer Marshall or to any other individual. The short automobile high speed pursuit had not endangered any individual other than the occupants of the two cars.

Russell Seals, Jr. and Raymond Arter, both minors of approximately 16 years of age, were arrested by Hartford Officers on the next day. Neither of them was charged with a felony. The charges against one were ultimately dropped. The other plead guilty to a misdemeanor charge receiving a suspended sentence.

SUMMARY OF ARGUMENT

1. In civil rights litigation, the law to be applied is federal law. If there is no relevant federal law, recourse may be had to state and other law, provided it is not inconsistent with the Constitution. It is not mandatory that state law be applied, rather the federal courts may use it if appropriate to fashion the federal law.

2. The federal decisions, although not clear on the precise rule, indicate that an approach to the use of deadly force by police officers that is more restrictive than the common law standard is preferred.

3. The history of the common law rule shows that its roots lie in the outmoded concepts of outlawry and trial by ordeal. Examination of its present justification shows that it lacks logical support and rests on brutalizing policy basis. Its current status in the states is one of increasing rejection. The scholarly examinations have uniformly criticized its formulation. It is unsuited for civil rights adjudication.

4. The common law rule violates the Due Process Clause of the Fourteenth Amendment, because it allows the arbitrary imposition of death, violates the presumption of innocence and denies the suspect a right to trial by jury.

5. A rule limiting the use of deadly force to situations protective of human life with sufficient definition is consistent with the laws and Constitution of the United States and the needs of law enforcement personnel.

ARGUMENT

The plaintiff brought this action to avenge the wrongful death of his 16 year old son. The claim on which he bases his entitlement to relief is that the defendant policy officer purposefully and wrongfully shot his child to death, depriving his child of life in violation of the Constitution of the United States.

There is no question that a police officer's misuse of his awesome power to terminate a life is in violation of the Constitutional command that no person shall be deprived of life without due process of law. Redress may be sought by employing the provisions of the Civil Rights Acts, 42 U.S.C. §1983. Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970); Beard v. Stephens, 372 F.2d 685 (5th Cir. 1967); Clark v. Ziedonis, 368 F.Supp. 544 (E.D. Wisc. 1973). See generally, Monroe v. Pape, 365 U.S. 167 (1961). What is under question is what defenses, if any, may be raised by the offending officer in order to justify his action, or to,at least, avoid liability for it.

The issue is presented in this case by the defendant's assertion that the common law rule relating to the use of deadly force by a police officer to effect the arrest of a fleeing felony suspect is the applicable rule, and that his behavior satisfied the requirements of that rule, thereby excusing him from liability for his acts. This was accepted by the District Court. Jones v. Marshall, 383 F.Supp. 358 (D. Conn. 1974). It is the plaintiff's contention that the common law rule is unavailable as a defense in civil rights actions, because it is inconsistent with the laws and with the Constitution of the United States. The defendant is and should be held liable for the effects of

his resort to violence.

I. FEDERAL COURTS HEARING CASES ARISING UNDER THE CIVIL RIGHTS ACTS ARE NOT OBLIGATED TO EMPLOY STATE TORT LAW RULES

It is important at the outset to define the nature and content of the law applicable in civil rights cases. Unfortunately, a pernicious misinterpretation of the relevant choice of law rules has resulted in significant confusion, seriously undermining the viability of the federal civil rights laws.

To reiterate the rubric that actions under Section 1983 were created to insure a federal forum for the protection of federal civil and constitutional rights against infringement by state officials, such as police officers, is to merely state the problem, Monroe v. Pape, supra. The provisions of the Constitution and statutes are not self-defining or self-detailing, and are in need of judicial implementation.

Normally, the choice of law rule to be followed would be the Rules of Decision Act, 28 U.S.C. §1652. This directs the federal courts to employ the laws of the states in which they are located, "except where the constitution, treaties or statutes of the United States shall otherwise require or provide." Since a section of the civil rights acts provides otherwise, §1652 does not apply. 42 U.S.C. §1988.[1]

Under the provisions of Section 1988 federal law always applies, unless it is "not adapted to the object" or "deficient" in remedial provisions. When such problems appear, resort may be had

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[1] Plaintiff believes that the arguments presented in Parts III and IV, supra, indicate that the "constitution" provides "otherwise" and thus the state rule could not be employed under 28 U.S.C. §1652.

to

> the common law, as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of such . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States.

More simply put, a federal court can employ whatever laws it finds necessary and proper to enforce the purposes of the civil rights acts. See generally Note, Choice of Law under Section 1983, 37 U. Chi. L. Rev. 494 (1970); Note, The Competence of Federal Courts to Formulate Rules of Decision, 77 Harvard L. Rev. 1084 (1964); Brazier v. Cherry, 293 F.2d 40 (5th Cir. 1961).

As clear as this may appear, federal judges have been confused about it and often see the resort to state law as mandatory, rather than permissive. See, e.g., Jones v. Marshall, 383 F.Supp. at 360; Thamel v. Town of East Hartford, 373 F.Supp. 455 (D. Conn. 1974). As far as can be determined this confusion is tied to a single sentence in the Supreme Court decision credited with expanding the applicability of Section 1983, Monroe v. Pape, supra. See Shapo, Constitutional Tort: Monroe v. Pape and the Frontiers Beyond, 60 N.W. U. L. Rev. 277 (1965).

The plaintiff in Monroe had been subjected to an early morning raid at his home by the defending police officers. His home was ransacked and much of the furniture was destroyed. He was then taken to the police station and held for ten hours during incommunicado interrogations in connection with a possible murder charge. Among others, the defendants raised a defense that a showing of a "specific intent" to

deprive the plaintiff of his civil rights was required as a predicate to recovery under Section 1983. This "specific intent" requirement is necessary under the criminal analogue, 18 U.S.C. §242. Screws v. United States, 325 U.S. 91 (1945).

In rejecting specific intent as a requirement under the civil remedy provisions of the civil rights acts, the Court stated that Section 1983, "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S., at 187. The "natural consequences" phrase has presented no problem, it simply means no intent is necessary. The "background of tort liability" language, however, has raised problems.

In large part, these problems were a result of the lack of clarity in the Supreme Court's opinion in Pierson v. Ray, 386 U.S. 547 (1967).

In Pierson the defendants raised defenses of judicial immunity, "executive" immunity for police officers, and that plaintiffs' consent to the allegedly unconstitutional arrests vitiated any possible injuries. In the course of accepting, modifying and rejecting (respectively), the three defenses raised, the Court relied on every available source of law possible: federal precedent, 386 U.S., at 554; treatises, a federal diversity decision, state law, 386 U.S., at 555; and nothing at all save its own definition of what was consistent with the purposes of Section 1983, 386 U.S., at 558. The Court did not provide an explanation of the choices it was making.

This failure to explain why it chose the particular state

rule that it did, coupled with the "background of tort liability" language from Monroe, has mislead federal courts into thinking that state law had to be followed, unless defective, e.g., 383 F.Supp., at 360. There is nothing, however, in Monroe that suggests that is what the Court meant, and certainly the Court's varied choice of law in Pierson points to precisely the opposite conclusion. Most importantly, the opinions cannot be read to mandate use of state tort law analogies, as that would fly in the face of the freedom of choice plan created under 1988.[2]

Thus, the state law defense interposed by the defendant in this action is acceptable only if (1) there is no federal law on the subject; (2) and it is not inconsistent with the laws or constitution of the United States.

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[2] It may very well be that the lower federal courts have simply mirrored the Supreme Court's approach in Pierson v. Ray, that is, they adopted the relevant state law for all the right reasons, but simply did not explain them. However, decisions such as the instant one under consideration and Thamel v. Town of East Hartford, supra, do present the worrisome picture of state law being selected for the wrong reasons. See Scheurer v. Rhodes, 416 U.S. 232 (1974); Bivens v. Six Unknown Federal Narcotics Agents, 456 F.2d 1339 (2d Cir. 1972) (federal common law analysis taking similar approach).

II. FEDERAL COURT DECISIONS INDICATE THE SECUREMENT OF A STANDARD RESTRICTING THE USE OF DEADLY FORCE TO CAPTURE FLEEING FELONS

The reported federal cases involving actions against police officers for the abuse of their power to employ deadly force, show a pattern that indicates that the appropriate rule under the civil rights acts is one that is more restrictive than the common law rule.

The common law rule, at least as stated by the Connecticut Supreme Court is as follows:

> Under our rule, in effecting a legal arrest, the arresting officer may . . . use such force as he reasonably believes to be necessary, under all the circumstances surrounding its use, to accomplish that purpose, that is, to effect the arrest and prevent an escape. . . But the use of a means, or of force, likely to cause death, as was the case here, is privileged only if the arrest was for a felony and the force used was reasonably believed to be necessary to effect that arrest. . .
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> . . . .
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> . . . An officer in using deadly force for this purpose must act in good faith. He must have actually believed, and also have had reasonable cause to believe, that it was necessary under the circumstances to use deadly force to make the arrest. Martyn v. Donlin, 151 Conn. 402, 411-12, 198 A.2d 704, 705 (1961)

An examination of the federal cases shows that in only one case has a federal court indicated that a test substantially identical with the Connecticut rule would be applied, Beard v. Stephens, 372 F.2d 685 (5th Cir. 1967) (adopting Alabama law).

The other cases present different tests. Roberts v. Trapnell, 213 F.Supp. 49 (E.D. Pa. 1962) appears to adopt the Pennsylvania common law rule, but that test is more restrictive than Connecticut's. Pennsylvania had a requirement that the suspect in fact have been a

felon, while Connecticut is satisfied with only a reasonable belief. See Commonwealth v. Duerr, 45 A.2d 235 (1946). Jackson v. Martin, 261 F.Supp. 902 (N.D. Miss. 1966) notes that deadly force can be used only in "certain aggrevated circumstances." The Mississippi state rule is a common law rule. In Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970) the court adopts the state law assault and battery test - culpable or gross negligence. While this case provides an important discussion of the civil rights and constitutional policies, it is somewhat different than the instant case, as the chase had already ended and the deadly force was not used to stop the suspect. The court in Love v. Davis, 353 F.Supp. 587 (W.D. La. 1973) employs the Louisiana state law test, which bars the use of force to stop someone suspected of having committed only a crime against property. See Sauls v. Hutto, 304 F.Supp. 124 (E.D. La. 1969). The Wisconsin rule applied in Clark v. Ziedonis, 368 F.Supp. 544 (E.D. Wisc. 1973) allows force to be employed only to apprehend persons suspected of committing "forcible felonies."

Although the tests used by the federal courts are varied, they do combine to present a discernible federal test: that the use of deadly force by police officers is to be restricted by rules other than the common law rule thereby insuring full protection of civil rights.

An examination of other federal decisions involving the use of deadly force is unproductive, as policies and rules differing from civil rights policies determine the choice of law rules in those cases.

In People of the State of Colorado for the Use of Little v. Hutchinson, 9 F.(2d) 275 (8th Cir. 1925) the policies of diversity litigation compelled adopting state law. Stinnett v. Commonwealth of

Virginia, 55 F.(2d) 644 (4th Cir. 1942) involved the prosecution of a federal officer that had been removed from the state to the federal courts. Under such circumstances, state rules applied. Similarly, attempts by federal officers to avoid extradition, Vaccaro v. Collins, 38 F.(2d) 862 (D. Md. 1930) or state prosecution, Castle v. Lewis, 254 F. 917 (8th Cir. 1918) warranted resort to state laws.

To the extent that the cases indicate a relevant federal rule, it should be noted that it is consistent with the deadly force rules of the other two states within the Second Circuit, both of which have forms of forcible felony rules. New York Penal Law §35.30 (McKinney's Supp. 1970); Vermont Stat. Ann. Title 13 §2305 (1974 Repl.). Adoption of the Connecticut rule would not only create confusion in the federal laws, it also would present a confusing situation within the Circuit.[3] The rejection of the common law rule as a standard under the civil rights acts is, however, warranted not only because of consistency; it is also "inconsistent with the laws and constitution of the United States."

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[3] It should be noted that the proposed new Federal Criminal Code adopted a rule limiting the use of deadly force to capture persons who commit violent felonies or threaten imminent danger to others. Final Report of the National Commission on Reform of Federal Criminal Laws (1971) §607(2)(d). See 1 Working Papers of the National Commission on Reform of Federal Criminal Laws, pages 268-269 (1970) for a discussion of the proposed statute. A rule similar to this was recommended in the Challenge of Crime in a Free Society: A Report by the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police, (1967) p. 189.

III. THE COMMON LAW RULE PERMITTING THE USE OF DEADLY FORCE IS INCONSISTENT WITH THE CIVIL RIGHTS LAWS

The common law rule is irrelevant to modern concepts of civil rights and law enforcement.

Its origins lie in the concept of outlawry - a concept calling for the extermination of felony suspects who refused to submit to the authority of the law.

> He who breaks the law has gone to war with the community; the community goes to war with him. It is the right and duty of every man to pursue him, to ravage his land, to burn his house, to hunt him down like a wild beast and slay him; for a wild beast he is; not merely is he a 'friendless man,' he is a wolf.
> 2 Pollock and Maitland, History of English Law, 2nd ed. (Cambridge University Press, 1918) at 449.

At its inception, outlawry had certain legal justifications: in a time "when the law was weak" and "could not measure its blows", 2 Pollock and Maitland, supra, a person who was so disdainful of its legitimacy was as much a threat to the developing social order as a wolf might be.

This "rationality" is reaffirmed when placed in the context of fuedal legal concepts. The initial felonious offenses were those that amounted to breaches of the feudal oaths of fealty and vasselage, thereby appearing as threats to the social order (like outlawry). 2 Pollock and Maitland, supra, at 466; 4 Blackstone, Commentaries,*94-98. Although the punishments originally imposed were loss of land and status, by the 12th century, death was the penalty for most felonies. Cantor, The English: A History of Politics and Society to 1760 (Simon and Schuster, 1967) 36-37. Also, whether the felon fled or submitted

to the law, he was confronted with a death penalty and loss of estates.

The astonishing aspect of this death-dealing legal system is that the innocent were as likely to suffer the same fate, since the major test of innocence was the drowning of the innocent in water. This "trial by ordeal" rested on the assumption that the blessing of a body of water would result in the rejection of the guilty, that is, they would float, who could then be seized and executed. Cantor, supra.

Fortunately the irrationality of the trial by ordeal was ended in 1215 when the Fourth Lateran Council prohibited clerical participation. Cantor, supra at 237; Strayer and Munro, The Middle Ages, 395-1500, 4th ed. (Appleton-Century-Crofts, 1918), 390. This did not, however, alter the penalties for guilt or flight. Furthermore, the change of outlawry from punishment to an arrest process did not alter its dehumanization of the suspect. 2 Pollock and Maitland, supra.

Against this historical background it is clear that the common law rule still retains the same elements of dehumanization of the suspect; the emphasis is on his capture not his life, no matter what the offense. Perkins, The Law of Arrest, 25 Iowa L. Rev. 201, 274. This is inappropriate in a legal system that places its primary emphasis on the protection of life.

It is also important to note that the common law rule lacks any logical relationship to the other elements of the legal system: (1) in the absence of a death penalty (or a severely limited range of crimes for which it may be imposed) there is no rational tie between the ultimate penalty and the application of deadly force. Note, The Appropriateness of Deadly Force, 15 Howard L. J. 306, 312 (1969).

(2) It is not justified as a penalty for the flight. Even if it were, it would still be illogical as the penalty for flight is not death. Note, The Civil Liability of Peace Officers for Wounding or Killing, 28 U. Cinn. L. Rev. 488 (1959). (3) It serves no deterrent purpose, Tsimbinos, The Justified Use of Deadly Force, 4 Criminal Law Bull. 3 (1968), and; (4) There are abundant alternative and less drastic means available, including merely effective police investigative techniques.[4] See, generally, The Challenge of Crime in a Free Society: A Report by the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Science and Technology (1969).

> It has been said, 'Why should not this man be shot down, the man who is running away with an automibile? Why not kill him if you cannot arrest him?' We answer: because, assuming that the man is making no resistance to the officer, he does not deserve death . . . Maybe I ask what we are killing him for when he steals an automobile and runs off with it? Are we killing him for stealing the automobile? If we catch him and try him, we throw every protection around him. We say he cannot be tried until 12 men of the grand jury indict him and then he cannot be convicted until 12 men of the petit jury have proved him guilty beyond a reasonable doubt, and then when we have done all that, what do we do to him? Put him before a policeman and have a policeman shoot him? Of course not. We give him three years in a penitentiary. It cannot be that we allow the officer to kill him because he stole the automobile, because the statute provides only three years in the penitentiary for that. Is it then for fleeing? And again I insist it is not a question of resistence of the officer. Is it for fleeing that we kill him? Fleeing from arrest is also a common law offense punishable by a light

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[4] In this case the two co-defendants were found and arrested the next day.

> penalty. A penalty much less than that of stealing an automobile. If we are not killing him for stealing the automobile and not killing him for fleeing, what are we killing him for? Note, Justification for the Use of Force in the Criminal Law, 13 Stanford L. Rev. 566, 581, n. 80, quoting Prof. Tikell, (1961)

Thus, the justification left for the application of the rule is that it has survived the test of time. But, as Mr. Justice Holmes has recognized:

> It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past. Holmes, The Path of the Law, Collected Legal Papers, (1920), 187.

In fact, Holmes' comment that '(t)he life of the law has not been logic, it has been experience,' The Common Law (1881) p. 1, is equally relevant as experience is teaching that the rule is illogical and irrelevant.

Several states have limited the common law rule by requiring that the suspect have in fact committed a felony as opposed to the officer acting on reasonable belief.[5] Alaska,[6] Florida,[7] Mississippi,[8] Nevada,[9] New Mexico,[10] North Dakota,

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[5] Alaska Rev. Stat. §11.15.090 (1962)

[6] Fla. Stat. Ann. §782.02

[7] Miss. Code Ann. §2218 (1942). See Hubbard v. State, 30 S.W.2d 901 (Miss. 1947), imposing a "last resort" requirement.

[8] Nev. Rev. Stat. §20.140 (1963)

[9] N.M. Stat. Ann. §40 A-2-7 (1953)

[10] N.D. Cert. Code §12-27-04 (1960)

Oklahoma,[11] South Dakota,[12] and Washington.[13] In Kentucky, this was accomplished by judicial decision. Petrie v. Cartwright, 70 S.W. 279 (Ky. 1902). See Note, Killing a Suspected Felon Fleeing to Escape Arrest, 38 Kentucky L. J. 609, 618 (1950); Note, Re-examination of the Right of an Officer to Kill a Fleeing Felony Suspect, 40 Kentucky L. J. 192 (1952) (rebuttal).

Other states have statutory rules similar to those of New York and Vermont: Louisiana,[14] Georgia,[15] Illinois,[16] Nebraska,[17] New Hampshire,[18] Oregon,[19] Pennsylvania,[20] and Utah.[21]

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11 Okla. Stat. Ann. 21 §732 (1958)

12 S.D. Code §22-16-32 (1967)

13 RCWA 9.48.160 (1960)

14 La. Rev. Stat. Ann. §111070 (1950)

15 Ga. Code Ann. §26-902 (1969)

16 Ill. Ann. Stat., ch. 8, §7-5 (Smith-Hurd 1964)

17 Neb. Rev. Stat. §28-839 (1972)

18 N.H. Rev. Stat. Ann. §627:5 (1971)

19 Ore. Rev. Stat. §161.239 (1971)

20 18 Pa. S. §508 (1972)

21 Utah Penal Code §76-2-404 (1973). Most of these are based on the ALI, Model Penal Code. See Part V, infra.

These differing statutory and judicial interpretations have lead to a situation where at least half the states have rejected or severely restricted the common law rule, thereby limiting the use of deadly force by police officers. See generally, Note, Justifiable Use of Deadly Force by the Police: A Statutory Survey, 12 William and Mary L. Rev. 67 (1970); 1973 IACP, Law Enforcement Legislative Research Digest, Statutory Reference Service, Compilation No. 3 (January 2, 1974).

Significantly, this increasing recognition[22] of the impropriety of the common law standard has been reflected in the guidelines and regulations adopted by police agencies. Recent surveys show that even in jurisdictions clinging to the common law, police agencies find the rule inappropriate. Note, The Use of Deadly Force in Arizona by Police Officers, 2 Law & the Social Order 481 (1973); Uelman, Varieties of Police Policy: A Study of Police Policy Regarding the Use of Deadly Force in Los Angeles County, 6 Loyola (L.A.) L. Rev. 1 (1973). See also Goldstein, Dershowitz and Schwartz, Criminal Law: Theory and Process (The Free Press, 1974) 337. In fact, the Connecticut state police have adopted a policy limiting the use of deadly force which is similar to the Model Penal Code. Conn. State Police Department

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22 Reference to footnotes 5 through 21, supra, will show that all code revisions in the past five years have, except for Connecticut, replaced the common law test with a more limited approach. E.g., Pennsylvania. At best, Connecticut's adherence to the rule is a result of inertia, rather than a reasoned communal acceptance, as suggested by the District Court, 383 F.Supp., at 361-362.

Rules, §20.29 (10/1/74).[23]

The most sustained attack on the common law rule has come from the legal commentators.

The American Law Institute adopted a rule in the 1934 draft of the Second Restatement of Torts limiting the use of deadly force to the apprehension of persons suspected of committing felonies involving a threat of death or serious bodily harm. This section was changed in 1948 to reflect the common law rule on the basis of a policy decision that the Restatement ought to reflect the prevailing law rather than the preferred.[24] See Note, The Use of Deadly Force by a Police Officer in the Apprehension of a Person in Flight, 21 U. Pitt.L. Rev. 132, 135 (1959) for a discussion of these changes. This compromise was not a bar to the development of a wholly different standard in the ALI's Model Penal Code, limiting the use of deadly force to situations involving the "use or threatened use of deadly force" by the suspect or where a delay in arrest would present a "substantial risk . . . (of) death or serious bodily harm." ALI, Model Penal Code, P.C.D. (1962), §3.07, Use of Force in Law Enforcement.

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[23] See 1 Working Papers of the National Commission on Reform of Federal Criminal Laws (1970), pp. 268-269 describing the federal agency limitations on the use of deadly force: defense of self and others.

[24] William Prosser, the "eminent authority" on tort law, see Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) takes a similar tack in his "hornbook", Law of Torts, 3rd. ed. (West Publishing Co. 1964) p. 137, proferring the preferred limited rule.

Law review writers evaluating the rule have uniformly called for its rejection, one writer going so far as to chide the judiciary for cowardice:

> It is to be regretted that the prouncements from the bench anent a modification have been confined to dicta. It is to be hoped there will be judges with sufficient courage to formulate a rule more consonant with the laws of humanity than is the present antequated law of the courts.
> Note, Legalized Murder of a Fleeing Felon, 15 Virginia L. Rev. 582, 585 (1929).

See also Pearson, The Right to Kill in Making Arrests, 28 Michigan L. Rev. 957 (1930); Tappan, Official Homicide, 6 Lawyers Guild Rev. 400 (1946); Note, The Use of Deadly Force by a Police Officer in the Apprehension of a Person in Flight, 21 U. Pitt. L. Rev. 132 (1959); Note, Justification for the Use of Deadly Force in the Criminal Law, 13 Stanford L. Rev. 566 (1961); Note, The Use of Deadly Force in the Apprehension of Fugitives from Justice, 14 McGill L. J. 295 (1968); Avins, Equal Protection Against Unnecessary Police Violence and the Original Understanding of the Fourteenth Amendment: A Comment, 19 Buffalo L. Rev. 599 (1970).

The sum total of all this is that the common law rule is woefully unsuited, because of its illogic, inhumanity, antiquity and lack of a reasonable foundation, for use in a system where uniformity, clarity, humanity and reasonableness are the primary interests. This inconsistency with the federal laws bars its application.

IV. THE COMMON LAW RULE IS INCONSISTENT WITH THE CONSTITUTION OF THE UNITED STATES

The wrongful taking of a suspect's life by a police officer improperly employing deadly force violates the Due Process Clause of the Fourteenth Amendment. Screws v. United States, supra; Jenkins v. Averett, supra; Love v. Davis, supra. In evaluating whether or not the common law rule creates situations regularly resulting in the wrongful taking of lives, thereby rendering it inconsistent with the constitution it is necessary to identify those elements of due process that are relevant to the inquiry.

First, the Due Process Clause is designed simply to prevent the arbitrary termination of a life by official action. Rochin v. California, 342 U.S. 165 (1952). See also Furman v. Georgia, 408 U.S. 238 (1972). The processes required under the Clause are all geared toward this end.

Second, the Clause embodies a requirement that all persons be presumed innocent until proven guilty beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). This presumption is more than just a statement of evidentiary burdens. It also establishes the requirements that suspects be treated like other persons and that their constitutional rights not be trammeled upon. See Rhem v. Malcolm, _____ F.2d _____ (2d Cir. 1974).

Finally, it defines the processes to be pursued in determining whether or not a life may be taken without trial by jury. Screws v. United States, supra.

The analysis of any conflicts between the common law rule and the elements of constitutional due process must be done against the recognition that due process is an historical concept, evolving to fit the needs of a developing constitutional system.

> (I)n applying this standard the courts are permitted, nay are required, to re-evaluate prior interpretations of the Due Process Clause in light of 'changing concepts as to minimum standards of fairness' . . . and with this view there could be little dispute what was regarded as fair in one epoch of our history as a nation may be regarded as fundamentally unfair in the next, even though the judgment is 'not ad hoc and episodic but duly mindful of reconciling the needs of continuity and of change in progressive society'. . . United States ex rel Wilkins v. Hetenyi, 348 F.2d 844, 863 (2d Cir. 1965)

See also Furman v. Georgia, 408 U.S., at 257 (Brennan, J.) and 314 (Marshall, J.); Roe v. Wade, 410 U.S. 113 (1973) (Blackmun, J.)[25]

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25 In Screws v. United States, 325 U.S. 91 (1925) the Supreme Court recognized the possible "unfairness" of subjecting an official to a criminal prosecution for violating a newly recognized due process element, and imposed a specific intent requirement in 18 U.S.C. §242. However, the Court specifically refused to find any similar problems under 42 U.S.C. §1983, Monroe v. Pape, 365 U.S., at 187.

A. The Common Law Rule Permits the Arbitrary Imposition of Death

As the District Court properly recognized, the sum total of the opinions in Furman v. Georgia is an insistence that death penalties not be arbitrarily imposed by judges and juries with unbridled discretion. 338 F.Supp., at 361. It is irrelevant for the purposes of this policy that Furman is an "8th Amendment case" and that this case is not concerned with punishment, because the reasons for protecting life under both the 8th and 14th Amendments are the same. Robinson v. California, 370 U.S. 660 (1962); Jenkins v. Averett, supra.

Against this backdrop, the common law rule fails to stand up. As long as sentencing authorities could impose a death penalty when reasonable, allowing a police officer to take a life when reasonable had a certain logic. Since the former is no longer permissible, the justification for the latter has disappeared.

This break in the logical tie is not the sole compulsion for abandoning the rule. Rather, it is the unbridled and unguided discretion given to the police officer by the common law test that creates the unconstitutionality: if a sentencing authority after a full hearing of the evidence and due deliberation cannot be entrusted with the power to take a life, how can we grant that power to police officers faced with making split-second decisions in the heat of pursuit? Clearly the errors of indiscretion are greater under those circumstances. Since the common law rule supports the exercise

of such discretion, it cannot be employed as the standard of performance. Furman v. Georgia, supra.

B. The Common Law Rule Ignores the Presumption of Innocence

Although it may seem circuitous, the reality is that the presumption of innocence demands precisely that: the suspect must be presumed innocent. The common law rule, despite attempts to claim otherwise, Note, 13 Stanford L. Rev., supra at 581, fails to comply with this requirement. This failure is evidenced in one of two ways: first, in assuming that the fleeing suspect is so dangerous that deadly force is warranted to stop him; or secondly that he can be shot at because he is attempting to avoid arrest and punishment for a crime that he committed. Neither assumption is acceptable as they both assume guilt.

The rule also violates the presumption of innocence in that it allows the police officer to act merely on the basis of a "reasonable belief", while the constitutional jury must act on the basis of proof beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). The drawing of an analogy to the exercise of probable cause does not provide a satisfactory answer as probable cause has been defined and described by decades of judicial decisions, providing an appropriate guide. See, e.g. Draper v. United States, 358 U.S. 307 (1959); Aguilar v. Texas, 378 U.S. 108 (1964).

C. The Common Law Rule Deprives the Individual of a Trial by Jury

The net effect of the common law rule is that it places the life and death decision in the hands of the police officer; who is acting alone as accuser, fact-finder, and sentencing authority.

It is absurd to suggest that the fault lies with the fleeing suspect; that all he would have to do to save his life and to have the benefit of his constitutional rights is to surrender. This turns around the commands of the Constitution, which are directed at preventing misconduct by state officers, and protecting the rights and lives of precisely those individuals who have taken action offensive to society.

> (I)t is plain that basic to the concept of due process of law in a criminal case is a trial -- a trial in a court of law, not a trial by ordeal . . . Those who decide to take the law into their own hands and act as prosecutor, jury, judge and executioner plainly act to deprive a prisoner of the trial which the Constitution of the United States guarantees him . . .
> Screws v. United States, 325 U.S., at 106

The constitutionality of the common law rule has been barely upheld in two decisions involving attacks on the Tennessee statutory version. Beech v. Melancon, 465 F.2d 425 (6th Cir. 1972); Cunningham v. Ellington, 323 F.Supp. 1072 (W.D. Tenn. 1971) (3-judge court).

The plaintiffs in Cunningham raised four points of attack: (1) that the rule allowed cruel and unusual punishment; (2) that it

was overly broad; (3) that it was unduly vague; and (4) that there was a denial of equal protection in the felony-misdemeanor distinction.

The court dismissed the first two claims by simply noting that "we simply are not dealing with punishment." 323 F.Supp., at 1072. The temptation to respond in an equally off-hand and unhelpful manner is great: there is no claim in this case that a punishment was inflicted. However, it is equally clear that the court's failure to analyze the policies involved in whether it might not be punishment or another form of due process violation renders the decision unhelpful. Cf. Rochin v. California, supra. Furthermore, it was decided prior to Furman v. Georgia and thus without the benefit of the guidance of that decision.

A similar response is warranted in regard to the court's rejection of the vagueness argument: the absence of Furman's guidance in regard to limiting the discretion available to those elements of the criminal justice system that dispense death is a significant distinction.

The equal protection argument in Cunningham is not involved in this case. As a matter of reality the distinction between the felony of auto theft (C.G.S. §53a-122, 123) and joy-riding (C.G.S. §14-229) is one without a practical difference at the arrest level. If dangerous to the community, they are equally so; if harmless, then permitting a police officer to shoot because the only differing

circumstance is the flight of the suspect is outrageous.

The court's rejection of this claim is, however, based on an erroneous reading of Skinner v. Oklahoma, 316 U.S. 535 (1942): Skinner would indicate that while a state may make classifications and distinctions between misdemeanors and felonies, it cannot impose dire consequences, such as death (or sterilization) on persons who commit substantially the same crime differently -- e.g. misdemeanor auto theft and felony auto theft.

The Court of Appeals decision in Beech v. Melancon, supra, provides even less guidance. The two judge majority simply relied on Cunningham. Judge McGee, concurring, viewed the case as one where the use of deadly force was related to the arrest of persons who had committed a crime threatening serious bodily harm. 465 F.2d at 426-427.

> For example, I would find it difficult to uphold as constitutional a statute that allowed police officers to shoot, after an unheeded warning to halt a fleeing income tax evader, antitrust law violator, selective service delinquent, or other person whose arrest might be sought for the commission of any one of a variety of other felonies of a type not normally involving danger of death or serious bodily harm. Id. 26

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26 Mr. Chief Justice Burger commented as follows in his opinion in Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. 388, 419 (1971):

> Freeing either a tiger or a mouse in a schoolroom is an illegal act, but no rational person would suggest that these two acts should be punished in the same way. From time to time judges have occasion to pass on regulations governing police procedures. I wonder what would be the judicial response to a police order authorizing 'shoot to kill' with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the

(footnote continued on next page)

Thus, these two federal decisions are not dispositive of any of the issues raised in this case. The unconstitutionality of the common law rule requires its rejection by this Court.

(footnote 26 continued from preceding page)

> police response must relate to the gravity and need; that a 'shoot' order might conceivably be tolerable to prevent the escape of a convicted killer but surely not for a car thief, a pickpocket or a shoplifter.

V. DEADLY FORCE MAY BE USED IN EFFECTING AN ARREST ONLY UNDER CERTAIN DEFINED CIRCUMSTANCES

The inapplicability of the common law rule leaves the federal court in the position of having to fashion its own rule, preferably one consistent with the limited approach evidenced by the majority of the federal decisions and thereby consistent with the requirements of the Constitution.

The taking of one life to protect the life of oneself or of another has always been sanctioned by society, Miller, Criminal Law, 199-218 and has been constitutionally recognized, Roe v. Wade, 410 U.S. 113, 163-165 (1973). These principles are in full accord with the constitutional emphasis placed on human life and dignity. The balancing is between the lives of a suspected wrong-doer and an apparent victim. Similarly, the use of deadly force may be sanctioned where there is reason to believe that the suspect's escape presents a threat of death or of serious bodily harm. Again the concern for the protection of human life allows for a balancing of the lives of the victim and the offender.

It is because of these principles relating to the need to respect human life and dignity that only a rule similar to that of the Model Penal Code rule is permissible. ALI Model Penal Code, §3.07, P.O.D. (1962). The most relevant sections provide:

> The use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes

that such force is immediately necessary to effect a lawful arrest. (However) the use of deadly force is not justifiable under this Section unless:

a. the arrest is for a felony; and

b. the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and

c. the actor believes that the force employed creates no substantial risk of injury to innocent persons; and

d. the actor believes that:

1. the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or

2. there is substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

It eliminates any arbitrariness in the use of deadly force by identifying those circumstances under which it may be used. (It is not unusually severe for a police officer to risk the life of a fleeing suspect for the purpose of arresting him where it is clear that the fleeing suspect has or will place the lives of others in danger.) Clearly, the thrust of the rule is to discourage the use of deadly force and therefore those circumstances that warrant its use will appear to be circumstances where the use of deadly force was entirely appropriate. An officer's failure to abide by the criteria set forth in such a rule

would and should subject him to sanctions for acting beyond the scope of what was approved by society. Finally, the rule reduces the use of deadly force for those circumstances where less drastic means are not available. The effect of this rule is to limit the opportunity for a police officer to employ deadly force to only those situations where it might be said there is a compelling need for him to do so.[27]

From the officer's point of view the precision of the rule relieves him of the anxious burden of deciding if it is appropriate to shoot. A reasonable and good faith belief that the elements of the rule were met, e.g., that the delay of the arrest presents a danger of bodily harm, will shield the officer from liability. Pierson v. Ray, 386 U.S. 547, 555 (1967); Bivens v. Six Unknown Named Federal Narcotics Agents, 456 F.2d 1339, 1347 (2d Cir. 1972).

This rule does not run afoul of the concern expressed in such cases as Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973) that the federal courts should not become a forum for litigating tort suits under the guise of civil rights actions. Unlike other cases, those coming under this rule have a finality about them that warrants the attention of federal courts, charged with the obligation of protecting federal

27 See American Law Institute, Model Penal Code, Tentative Draft No. 8, (1958) pages 52-63 for a full discussion of the position of the American Law Institute on the adopted rule. See also Love v. Davis, 353 F.Supp. 587 (E.D. La. 1973).

constitutional rights.

Nor does the acceptance of this rule result in a declaration of the unconstitutionality of the Connecticut criminal law justifiable homicide statute, C.G.S. §53a-22, even though it is identical to the common law rule. The policies that might warrant a state's interest in providing protection to police officers from the rigors of the criminal law are not the same as warrant imposing civil liability for the wrongful invasion of constitutional rights. This is reflected in the federal laws by the "specific intent" distinction between 18 U.S.C. §242 and 42 U.S.C. §1983. Screws v. United States, supra; Monroe v. Pape, supra.

VI. CONCLUSION

The inconsistency existing between the common law deadly force rule and the laws and Constitution of the United States warrant adopting a different rule of liability. Under the rule proposed by the plaintiff, the defendant is liable for the death of Dennis Jones: (1) it is clear that the crime involved was not one that involved the "use or threatened use of deadly force"; (2) nor was there a "substantial risk" that a delay in the arrest of Dennis Jones would "cause death or serious bodily harm"; (3) nor, in light of local police gun use guidelines, could the defendant have had a good faith belief that either of the two elements were met.[28]

Wherefore, plaintiff respectfully requests this Court vacate the judgment of the District Court and remand the matter with instructions to enter judgment for the plaintiff.

28

> In the Connecticut Police and Prosecutors Manual, you have read, when possible, you should, shoot to wound the person rather than to kill. The statement is right, but neither you nor I can be sure that the shot intended to injure and disable will not kill either the person that you are shooting at or some other person.
>
> Therefore it is best to shoot only when killing would be justified. Shoot to kill.
>
> Stealing a motor vehicle is a felony but shooting at a car that is carried on your verified list or just given out is the wrong thing to do. You do not know who is in the car or why. It could even be the owner. Most times it is some kid, who, if caught, is turned over to the Juvenile Court, or, if a little older is charged with taking a motor vehicle without permission, a misdemeanor. "Gun Use Guidelines Are Read by Police Force," West Hartford News, December 18, 1969, page 6.

Respectfully submitted

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Dated at Hartford Connecticut
this 14 day of February, 1975

Certification

This is to certify that a copy of the foregoing has been duly mailed to:

Robert Y. Pelgrift, Esq.
Old Mountain Road
Farmington, Connecticut

This 14th day of February, 1975

_____

LOUIS FARLEY

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief was mailed, postage prepaid, to Robert Pelgrift, 90 Brainard Road, Hartford, Connecticut.

Bruce Mayor